(1)

Supreme Court, U.S.
FILED

96 985 DEC 16 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ANTONIO CESAR CHAMORRO-TORRES,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TROY R. DOUGLAS
Ark Bar No. 68015
2414 S. 57th Street, Suite 101
Fort Smith, AR 72903
(501) 484-5759
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31 pp

Question for Review

Petitioner respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals entered on September 17, 1996 granting Respondent's Motion to Dismiss the Petition for Review for Lack of Jurisdiction, thereby giving retroactive application under pertinent provisions of Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996, which application is contrary to the intent of Congress, and violates the due process clause and Article Three of the Constitution of the United States.

CITATION TO ORDER

The Order subject to this Petition was entered September 17, 1996 in the United States Court of Appeals for the Fifth Circuit, Antonio Cesar Chamorro-Torres, Petitioner v. Immigration and Naturalization Service, Respondent, Case No. 95-60703, a copy of which appears in the Appendix hereto.

JURISDICTION

The Order of the Court of Appeals for the Fifth Circuit was made and entered on September 17, 1996, and a copy thereof is appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 2350(a).

STATUTES INVOLVED

The relevant statutory provisions are as follows and appear in the Appendix attached hereto:

28 U.S.C. Sec. 1254(1); 28 U.S.C. Sec. 2350(a); 8 U.S.C. Sec. 1251(a)(2)(B)(i); 8 U.S.C. Sec. 1182(c); 8 U.S.C. Sec. 1105a(a); P.L. No. 104-132, 110 Stat. 1214, Section 440(a); U.S. Constitution, Article III; U.S. Constitution, Amendment V.

STATEMENT

Petitioner is a native and citizen of Chile who first entered the United States on or about August 14, 1977 as an immigrant. On November 2, 1990, he was convicted for the offense of racketeering and money laundering. The Immigration and Naturalization Service ("INS") issued an Order to Show Cause on August 19, 1993 charging Petitioner with being deportable under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. Sec. 1251(a)(2)(B)(i). In October of 1994, an Immigration Judge found the Petitioner to be deportable and granted his request for a waiver of deportation under Section 212(c) of the Act, 8 U.S.C. Sec. 1182(c). The INS appealed and the Board of Immigration Appeals ("the Board"), on October 11, 1995 reversed the grant of the waiver of deportability, finding that the Petitioner had abandoned his lawful permanent resident status and, was, therefore, ineligible for a 212(c) waiver. On November 30, 1995, the United States Court of Appeals for the Fifth Circuit granted petitioner's Motion for Stay of Deportation pending review, same having been unopposed.

On April 24, 1996, while petitioner's Petition remained pending before the United States Court of Appeals for the Fifth Circuit, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, P.L. No. 104-132, 110 Stat. 1214 ("AEDPA"), Section 440(a) of which provided:

Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in Section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by Section 241(a)(2)(A)(ii) for which both predicate offenses are covered by Section 241(a)(2)(A)(i), shall not be subject to review by any Court.

Subsequently, the INS filed its Motion to Dismiss Petition for Review for Lack of Jurisdiction, citing the provisions of Section 440(a), and the Fifth Circuit's opinion in *Mendez-Rosas v. INS*, 87 F.3d 672 (5th Cir. 1996). Petitioner responded and by motion requested that the Court defer action on the Motion to Dismiss pending determination of *Williams v. INS*, 5th Cir. Case No. 96 6031, then pending and believed to be on all fours with the instant proceeding.

On September 17, 1996, the Court entered its Order denying the Motion to Defer Action and granting the Respondent's Motion to Dismiss for Lack of Jurisdiction. It is this Order which has precipitated the Petition before the United States Supreme Court.

EXISTENCE OF JURISDICTION BELOW

The jurisdiction of the Fifth Circuit Court of Appeals under 8 U.S.C. Sec. 1105a(a).

ARGUMENT

The decision below should be reviewed because it erroneously retroactively applies Sec. 440(a) of the Anti-terrorism and Effective Death Penalty Act of 1996, P.L. No. 104-132, 110 Stat. 1214, to divest the court of jurisdiction of a case already accepted. It is respectfully suggested this is contrary to the intent of Congress, and is in violation of the due process clause and Article III of the Constitution of the United States. This is an important Federal question that has not been, but should be, settled by this Court.

It is respectfully submitted that Section 440(a) cannot apply to pending cases, since a statute must not be given retroactive effect without clear Congressional intent to achieve that result. *Landgraf v. U.S.I. Film,* 128 L. Ed. 2d 229 (1994). AEDPA contains no such expression of retrospective intent. In addition, under the recent decisions of this Court, a statute may not be applied retroactively where doing so would totally eliminate Federal Court jurisdiction. *Hartford Casualty v. FDIC,* 21 F.3d 696 (5th Cir. 1994).

It is respectfully suggested that Section 440(a) of AEDPA violates due process in light of the long standing suggestion that deportation triggers Constitutionally recognized liberty interests and this Court's recent reiteration of the importance of "meaningful" judicial review even for an undocumented alien claiming a statutory entitlement. *Wong Wing v. United States,* 163 U.S. 228 (1896); *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950); *McNary v. Hiatian Refugee Center,* 498 U.S. 479 (1991).

Finally, it is respectfully submitted that Section 440(a) violates Article III of the United States Constitution which "serves both to protect the role of the independent judiciary within the Constitutional scheme of tripartheid government . . . and to safeguard litigants' right to have claims decided before Judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833 (1986). Further, the holding of this Court in *INS v. Chadha,* 462 U.S. 919 (1983) appears applicable where the Court stated "the plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a Constitutionally permissible means of implementing that power." 462 U.S. at 940-41.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TROY R. DOUGLAS
Ark Bar No. 68015
2414 S. 57th Street, Suite 101
Fort Smith, AR 72903
(501) 484-5759
Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95 60703

ANTONIO CESAR CHAMORRO-TORRES

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an Order of the
U.S. Immigration & Naturalization Serv.

(Filed Sep. 17, 1996)

Before EMILIO M. GARZA, STEWART and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of petitioner to defer action on respondent's motion to dismiss the petition for review is DENIED

IT IS FURTHER ORDERED that the motion of respondent to dismiss the petition for review for lack of jurisdiction is GRANTED

/s/ Illegible

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60703

ANTONIO CESAR CHAMORRO-TORRES

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an Order of the
Immigration and Naturalization Service

(Filed Nov. 30, 1995)

Before DAVIS, BARKSDALE and DEMOSS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the unopposed motion of petitioner for stay of deportation pending review is GRANTED.

MOT-17

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A36 355 460 – Houston Date: OCT 11 1985

In re: ANTONIO *CHAMORRO*-TORRES a.k.a. Antonio Cesar Chamarro [sic]

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: R. Travis Douglas, Esquire
8011 Meadow Drive
Fort Smith, Arkansas 72903

ON BEHALF OF SERVICE: Philip S. Law
General Attorney

CHARGE:

Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility

In a decision dated October 31, 1994, an Immigration Judge found the respondent deportable as charged and granted his application for a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The Immigration and Naturalization Service appealed from the grant of section 212(c) relief. The appeal will be sustained.

The respondent is a 44 year-old native and citizen of Chile, who was admitted into the United States as a

lawful permanent resident on August 14, 1977, based upon his marriage to a United States citizen. The respondent and his wife have two sons and he also has two adult step-sons from his wife's prior marriages. In October of 1988, the respondent, his wife, and their family, moved to Chile. According to the respondent, he wanted to return to Chile to engage in his family owned business and to establish a better life for his family. The respondent sold everything he owned in the United States before moving back to Chile. His wife and their children stayed in Chile for approximately 7 to 9 months. He and his wife then separated and his wife and their children left Chile and returned to the United States because of cultural differences (Tr. at 66). The respondent continued to live in Chile. He ultimately returned to the United States in October of 1989. Soon thereafter, the respondent was arrested and charged with money laundering and cocaine trafficking crimes. On November 2, 1990, the respondent was convicted on a plea of guilty to money laundering and he was sentenced to serve 51 months in a federal prison.

In addition to his money laundering conviction, the respondent was convicted in 1980 in the State of Texas for disorderly conduct. In 1984, the respondent was convicted in the State of Texas for aggravated assault on a peace officer and resisting arrest.

During the deportation hearing, the respondent applied for relief under section 212(c) of the Act. That section provides, in pertinent part, that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished

domicile of 7 consecutive years, may be admitted in the discretion of the Attorney General.

In a decision dated October 31, 1994, the Immigration Judge found the respondent eligible for section 212(c) relief. She then concluded that the respondent merited section 212(c) relief as a matter of discretion.

On appeal, the Service asserts that the Immigration Judge erred in granting section 212(c) relief in view of the fact that the respondent failed to establish that he had not abandoned his lawful permanent resident status, thus rendering himself statutorily ineligible for section 212(c) relief.

We agree with the Service. We are not addressing an issue of deportability where the burden is on the Service. The respondent is applying for relief from deportation and must establish his statutorily [sic] eligibility for such relief. As part of that showing he must demonstrate an unrelinquished lawful domicile of 7 consecutive years. Thus, he bears the burden of proving that he remained domiciled in the United States over the period from October 1988 through October 1989. On the facts before us, we do not find that the respondent has met his burden. The respondent has not demonstrated that his attempts to reestablish himself in Chile did not constitute a change of domicile, thus rendering him statutorily ineligible for section 212(c) relief. He sold his home and moved his entire family to Chile for a better life and employment. The record reflects that the respondent's move to Chile was neither temporary nor casual. His move to Chile took place only after careful planning and discussions with his wife. They decided that they could probably make a

better life in Chile for themselves and for their children. They sold everything they owned before moving back to Chile. The respondent wanted to return to his family's business in Chile. During his entire residence of approximately 1 year in Chile the respondent had no actual home in the United States to which he could return. The respondent has not shown that he considered the United States to be his home when he departed in October of 1988. *See Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980).[1] Moreover, he has not responded to the Service's arguments on appeal. Under these facts, we do not find the respondent has met his burden of establishing eligibility for section 212(c) relief.

Accordingly, the Service's appeal will be sustained, the respondent's application for relief from deportation under section 212(c) will be denied, and the respondent shall be ordered deported to Chile. In this latter regard, we note that the respondent declined to designate a country of deportation and the Immigration Judge stated that deportation would be directed to Chile should that become necessary (Tr. at 8).

ORDER: The decision of the Immigration Judge is reversed.

---

[1] The Service also argues that the Immigration Judge erred in evaluating the discretionary factors in this case. In view of our finding that the respondent is ineligible for section 212(c) relief, we find it unnecessary to consider whether the Immigration Judge erred in analysis concerning whether the respondent merits section 212(c) relief as a matter of discretion.

FURTHER ORDER: The Service's appeal is sustained and the respondent's relief from deportation under section 212(c) is denied.

FURTHER ORDER: The respondent is ordered deported to Chile on the charge contained in the Order to Show Cause.

/s/ Mary Maguire Dunne
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Houston, Texas

File: A36-355-460	)	
In the Matter of:	)	
CHAMORRO, Antonio Cesar	)	IN DEPORTATION
Respondent	)	PROCEEDINGS
	)	

ON BEHALF OF RESPONDENT:

R. Travis Douglas, Esq.
8011 Meadow Drive
Fort Smith, AR 72903

ON BEHALF OF SERVICE:

Philip Law, INS
General Attorney
Houston, Texas

DECISION OF THE IMMIGRATION JUDGE

The Respondent is a native and citizens of Chile who first entered the United States on or about August 14, 1977, as an immigrant. Subsequent thereto, on November 2, 1990, he was convicted in for the offense of racketeering and money laundering, in violation of Title 18 USC Sec. 1956. The Immigration and Naturalization Service, hereinafter referred to as the Immigration Service, issued an Order to show cause on August 19, 1993, charging the Respondent with being deportable under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act, hereinafter referred to as the Act, as an alien who has been convicted violation of (or a conspiracy or attempt to violate) any law or regulations of a state . . . related to controlled substances. On January 26, 1994, all parties appeared before this

Court. Respondent admitted to the truth of the allegations in the Order to Show Cause and conceded deportability as charged.

Based on these admissions, the Court found that deportability was established by clear, convincing and unequivocal evidence. Woodby v. I.N.S., 385 U.S. 276 (1966). The Respondent requested and received permission to file for a waiver of excludability under Section 212(c) of the Act. Section 212(c) provides, in pertinent part, that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General with out regard to certain specified grounds for exclusion enumerated in Section 212(a) of the Act. The Court finds that the Respondent meets the threshold of statutory eligibility for Section 212(c) relief.

Section 212(c), however, does not provide an indiscriminate waiver for all who demonstrate statutory eligibility.

Instead, the attorney General or his delegate is required to determine whether, as a matter of discretion, an applicant warrants the relief sought. The alien bears the burden of demonstrating that his application merits favorable consideration. Matter of Marin, 16 I&N Dec. 581 (BIA 1978). The court will weigh adverse factors such as the gravity of the offense, violations of immigration laws, criminal records and bad character against favorable factors such as United States *family ties, long residence, hardship, military service, employment history, holdings in the United States, community involvement, rehabilitation*

and good character. When an individual is convicted of a serious drug offense he has the additional burden of showing that the negative factor of that conviction is outweighed by *unusual or outstanding countervailing equities*. Id.

The Respondent plead guilty to three counts of money laundering, the government dismissed counts one and two and recommended the minimum sentence as mandated by the sentencing guidelines. The United States District Court for the Southern District of Texas, based upon the motion of the United States Government took into consideration the fact that the Respondent "substantially cooperated with the DEA and . . . was the first person to plead and probably helped others." (sentencing transcript at p.2) and lessened the Respondent's sentence. The facts and circumstances leading to his arrest for this offense revealed the following scenario. The Respondent was in need of money and accepted an offer from an acquistance to participate in illegal activity to acquire funds. In addition, the Respondent was arrested eight or nine years ago as the result of a domestic matter.

The Court is mindful of Respondent's equities in this matter. He has resided in the United States for seventeen years and has attained status as a lawful Permanent Resident. The record reflects Respondent has strong family ties and has been a good husband and father (Exhibits #3 R.O.P.). He has maintained steady employment and received commendation from his employer.

The Court has considered these equities in reference to the offense committed. However, just as important, the Court has considered these equities in reference to not

only the offense but also Respondent's testimony and demeanor on the witness stand at the hearing. The Respondent's family testified in support of his application. They are a close and supportive family.

The Court believes that this Respondent merits a favorable Discretionary Relief. The Respondent possesses unusual or outstanding countervailing equities and they do outweigh his conviction.

ORDER: relief under section 212(c) of the Act is GRANTED.

Dated this 31st day of October, 1994.

/s/ Clarease Mitchell Rankin
CLAREASE MITCHELL RANKIN
Immigration Judge

Pertinent provisions of Constitutional and statutory citations pursuant to Supreme Court Rule 14.1(f).

28 U.S.C. Sec. 1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . "

28 U.S.C. Sec. 2350(a)

" . . . a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari."

8 U.S.C. Sec. 1251(a)(2)(B)(I)

"Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign county relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involved possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. Sec. 1182(c)

"Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicil of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title."

8 U.S.C. 1105a(a)

"The procedure prescribed by, and all the provisions of Chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that . . . (10) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

P.L. No. 104-132, 110 Stat. 1214, Section 440(a)

"Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows: (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or

(D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(I), shall not be subject to review by any court."

U.S. Constitution, Article III

"2. (1) The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . "

U.S. Constitution, Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 95-60703

ANTONIO CESAR CHAMORRO-TORRES, **Petitioner,** **vs.** **IMMIGRATION AND NATURALIZATION SERVICE,** **Respondent.**	**Petition For Review Of Final Order Of Deportation** **Board Of Immigration Review INS Case No. A36 255 460**

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Petitioner, through undersigned counsel, OPPOSES respondent's Motion To Dismiss this case, for the following reasons:

RESPONDENT'S POSITION

Respondent argues that Section 440(a) of the Antiterrorist and Effective Death Penalty Act of 1996 ["AEDPA"] Section 440(a) retroactively denies authority for judicial review of actions of the Board Of Immigration Appeals ["BIA"] in cases involving aliens convicted of certain enumerated crimes. Thus, it is contended that this Court

no longer has jurisdiction to review the denial of petitioner's application for waiver of deportation under Section 212(c) of the Immigration & Nationality Act ["INA"].

DISCUSSION

[a] ADEPA cannot apply to cases pending review prior to enactment of the statute since a statute must not be given retroactive effect without clear congressional intent being shown. *Landrif v. USI Film*, 128 L.Ed. 2d. 229 (1994). Further, a statute may not be applied retroactively where such application would totally eliminate federal court jurisdiction. *Hartford casualty v. FDIC*, 21 F.3d 696 (5th Cir. 1994).

[b] Application of Section 440(a) retroactively will require this Court to hold ADEPA unconstitutional on the ground that if [sic] denies petitioner's liberty without due process of law in violation of the Due Process Clause of the United States Constitution. Further, total elimination of judicial review of government agency action violates the Separation Of Power doctrine of Article III of the Constitution. The Case of *Williams v. INS*, 96-1131321 is presently pending before this court.

[c] *Williams*, 5th Cir. Case No. 96-6034, has been argued and is presently pending decision by this Court. Mr. Jose Vega, Attorney of Record in *Williams*, has furnished undersigned counsel with a copy of the Petitioner's Brief In Response to the INS's Motion To Dismiss the *Williams* case. A review of the law and arguments presented in *Williams* indicates that it is identical factually and legally with this case. In the interest of judicial economy it is suggested that the Court defer action on

Respondent's Motion To Dismiss this case until a decision is rendered in the *Williams* case.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that Court to deny Respondent's Motion To Dismiss herein and review this case on the merits and issues presented in Petitioner's Opening Brief herein.

Respectfully Submitted,

/s/ R. Travis Douglas
R. Travis Douglas
Attorney For Petitioner
2414 S. 57th Street, Suite 101
Fort Smith, AR 72903
[501] 484-5668

CERTIFICATE OF SERVICE

I hereby certify that the following documents was served on the following listed individuals and entities by United States Mail, postage prepaid, on the date shown below, to-wit:

DOCUMENTS SERVED:

Petitioner's Response in Opposition To Respondent's Motion To Dismiss.

PERSONS AND ENTITIES SERVED:

Mr. Hugh G. Mullane, Attorney, Department Of Justice, Office Of Immigration Litigation, Civil

Section, Box 878, Ben Franklin Station, Washington, D.C. 20044.

7/29/96
Date Served

/s/ R. Travis Douglas
R. Travis Douglas

U.S. Department of Justice

(Seal)
PMJ:HGM:hgm
39-74-1267

Telephone: 202-616-9095

Washington, D.C. 20530

July 18, 1996

Honorable Charles R. Fulbruge III, Clerk
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: Antonio Cesar Chamorro-Torres v. INS,
No. 95-60703; A36 255 460

Dear Mr. Fulbruge:

Pursuant to Rule 28(j), Federal Rules of Appellate Procedure, the respondent provides these citations to the following supplemental authorities.

In *Mendez-Rosas v. INS*, 1996 WL 350716 (5th Cir. Jun. 26, 1996) (copy enclosed), this Court resolved the issue of whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act applies retroactively. This issue is discussed at pages 15-17 of respondent's brief.

In *Matter of Soriano*, Interim Dec. No. 3289 (BIA Jun. 27, 1996) (copy enclosed), the Board of Immigration Appeals issued a precedent decision regarding the issue of whether Section 440(d) of the Antiterrorism and Effective Death Penalty Act applies retroactively. The Commissioner of the Immigration and Naturalization Service has referred this case for review by the Attorney General pursuant to 8 C.F.R. § 3.1(h)(iii). A copy of the referral is

enclosed. The retroactivity issue is discussed at pages 18-21 of respondent's brief.

Sincerely,

/s/ Hugh G. Mullane
HUGH G. MULLANE
Attorney
Office of Immigration Litigation
Civil Division
Department of Justice
PO Box 878, Ben Franklin Station
Washington, DC 20044

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANTONIO CESAR CHAMORRO-TORRES,	)	
Petitioner,	)	No. 95-60703
v.	)	A36 255 460
IMMIGRATION AND NATURALIZATION SERVICE,	)	
Respondent.	)	

MOTION TO DISMISS PETITION FOR REVIEW FOR LACK OF JURISDICTION

Respondent, through its undersigned counsel, respectfully moves the Court to dismiss this petition for review, because the Court lacks jurisdiction under the recently enacted Antiterrorism and Effective Death Penalty Act ("AEDPA").

BACKGROUND

Chamorro was convicted for racketeering and money laundering in violation of 18 U.S.C. § 1956(a)(1)(A). A.R. 524. The Immigration and Naturalization Service ("INS") issued an Order to Show Cause ("OSC") against Antonio Chamorro-Torres ("Chamorro") on August 19, 1993. A.R. 522. The Order to Show Cause charged Chamorro with deportability under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1215(a)(2)(B)(i), based on Chamorro's conviction for racketeering and money laundering in violation of 18

U.S.C. § 1956(a)(1)(A). A.R. 524. Chamorro conceded deportability and sought relief from deportation pursuant to Section 212(c) of the INA. A.R. 65-67.

Petitioner filed his brief on May 14, 1996, and respondent filed its brief on June 16, 1996. No reply brief was filed by petitioner. Accordingly, this case has been fully briefed.

DISCUSSION

On April 24, 1996, President Clinton signed into law the AEDPA, which amends Section 106(a) of the INA by eliminating judicial review of any final deportation order against an alien "who is deportable by reason of having committed a criminal offense covered in Section 241(a)(2)(A)(iii), (B), (C), or (D). . . . " of the INA.

On June 26, 1996, this Court concluded that AEDPA was retroactive and therefore it lacked jurisdiction to consider the Board's denial of Section 212(c) relief. *Mendez-Rosas v. INS*, 1996 WL 350716 (5th Cir. Jun. 26, 1996). The Court wrote:

> Because § 440(a) explicitly affects jurisdiction, it speaks to the power of the court, rather than to the rights or obligations of the parties. As such, it is easily classified as jurisdictional in nature. We, therefore, presume that § 440(a)'s bar of judicial review retroactively applies in this action.

Id. at *3. Because the Court lacked judicial review over the Board's decision it dismissed the petition for review. *Id.* at *4.

Chamorro conceded that his money laundering and racketeering offense made him deportable pursuant to Section 241(a)(2)(B)(i) of the INA, 8 U.S.C. § 1251(a)(2)(B)(i). A.R. 65-67. Accordingly, as *Mendez-Rosas* makes clear, this Court no longer has jurisdiction to review the Board's decision pursuant to Section 440(a) of AEDPA. Accordingly, Chamorroe's petition for review should be dismissed for lack of jurisdiction.

CONCLUSION

For the reasons stated, the Court should dismiss this petition for review for lack of jurisdiction.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
Civil Division

PHILEMINA MCNEILL JONES
Assistant Director

/s/ Hugh G. Mullane
HUGH G. MULLANE
Attorney
Civil Division
Office of Immigration Litigation
United States Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044
(202) 616-9095

Dated: July 18, 1996 Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 1996, one copy of Respondent's Motion to Dismiss for Lack of Jurisdiction was served on the petitioner by placing it in a Department of Justice mail room for same-day mailing, addressed to:

Mr. R. Travis Douglas, Esq.
2414 S. 57th Street
Suite 101
Fort Smith, AR 72903

/s/ Hugh G. Mullane
HUGH G. MULLANE
Attorney
Civil Division
Office of Immigration Litigation
United States Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044

Supreme Court, U.S.
FILED
JAN 31 1997
CLERK

No. 96-985

In the Supreme Court of the United States

OCTOBER TERM, 1996

ANTONIO CESAR CHAMORRO-TORRES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DONALD E. KEENER
HUGH G. MULLANE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which prohibits courts from reviewing final deportation orders against aliens convicted of certain serious crimes, divested the courts of appeals of jurisdiction over petitions for review that were pending at the time of its enactment.

2. Whether Section 440(a) of the AEDPA violates the Due Process Clause of the Fifth Amendment and the separation of powers doctrine.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Arevalo-Lopez v. *INS*, No. 96-1754, 1997 WL 1898 (7th Cir., Jan. 3, 1997)	8
Bakelite Corp., Ex parte, 279 U.S. 438 (1929)	10
Bruner v. *United States*, 343 U.S. 112 (1952)	6
Burbano, In re, 20 I. & N. Dec. 872 (BIA 1994)	13
Carlson v. *Landon*, 342 U.S. 524 (1952)	12
Crowell v. *Benson*, 285 U.S. 22 (1932)	10
De La Rama Steamship Co. v. *United States*, 344 U.S. 386 (1953)	6
Duldulao v. *INS*, 90 F.3d 396 (9th Cir. 1996)	5, 7, 14, 15
Edward v. *Paul*, 814 F.2d 52 (1st Cir. 1987)	13
Fiallo v. *Bell*, 430 U.S. 787 (1977)	10, 11
Fong Yue Ting v. *United States*, 149 U.S. 698 (1893)	12
Galvan v. *Press*, 347 U.S. 522 (1954)	11, 13
Gurnee v. *Patrick County*, 137 U.S. 141 (1890)	6
Gwin v. *United States*, 184 U.S. 669 (1902)	6
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952)	12
Hincapie-Nieto v. *INS*, 92 F.3d 27 (2d Cir. 1996)	4, 8, 14
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984)	16
INS v. *Rios-Pineda*, 471 U.S. 444 (1985)	12
INS v. *Yang*, 117 S. Ct. 350 (1996)	9
Insurance Co. v. *Ritchie*, 72 U.S. (5 Wall.) 541 (1867)	6

Cases—Continued: Page

Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 11
Kline v. *Burke Constr. Co.*, 260 U.S. 226 (1922) 6
Kolster v. *INS*, 101 F.3d 785 (1st Cir. 1996) 4, 14, 15
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 5, 6, 7, 16
Landon v. *Plasencia*, 459 U.S. 21 (1982) 11, 13
McCardle, Ex parte, 74 U.S. (7 Wall.) 506 (1860) 6
Mendez-Rosas v. *INS*, 87 F.3d 672 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997) 4, 5, 7
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) 10
Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 11, 12
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 9, 10
Ortwein v. *Schwab*, 410 U.S. 656 (1973) 13
Railroad Co. v. *Grant*, 98 U.S. 398 (1879) 6
Reno v. *Flores*, 507 U.S. 292 (1993) 10
Reyes-Hernandez v. *INS*, 89 F.3d 490 (7th Cir. 1996) 5, 8
Rolle v. *INS*, No. 96-9518 (11th Cir. July 12, 1996) . 5
Salazar-Haro v. *INS*, 95 F.3d 309 (3d Cir. 1996) 4, 14
Sanchez-Rodriquez v. *INS*, No. 96-9518 (10th Cir. July 12, 1996) 5
Scheidemann v. *INS*, 83 F.3d 1517 (3d Cir. 1996) ... 16, 17
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 10
Sherman v. *Grinnell*, 123 U.S. 679 (1887) 6
Soriano, In re, Interim Dec. No. 3289 (BIA June 27, 1996) 17
The Assessors v. *Osbornes*, 76 U.S. (9 Wall.) 567 (1870) 6
United States ex rel. Tisi v. *Tod*, 264 U.S. 131 (1924) 15

Cases—Continued: Page

United States ex rel. Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103 (1927) 15
Woodby v. *INS*, 385 U.S. 276 (1966) 13

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 9 14
Art. III 14
Art. III, § 1 9
Amend. V (Due Process Clause) 9, 11
Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 9
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 3
§ 401(e), 110 Stat. 1268 3
§ 440, 110 Stat. 1276 7
§ 440(a):
110 Stat. 1276 ..... 3, 4, 5, 7, 11, 14
110 Stat. 1276-1277 3
§ 440(d), 110 Stat. 1277 ..... 3-4, 16, 17
§ 440(f), 110 Stat. 1278 6
Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. III, Subtit. A, 110 Stat. 3009 8
§ 304(a)(3) 17
§ 304(b) 8, 17
§ 306(a) 8
§ 306(a)(2) 8
§ 306(b) 8
§ 309(a) 9, 17
§ 309(c) 17
§ 309(c)(4) 9
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
§ 101(a)(43), 8 U.S.C. 1101(a)(43) 7
§ 106, 8 U.S.C. 1105a 8
§ 106(a)(1)-(6), 8 U.S.C. 1105a(a)(1)-(6) 3

Statutes and regulations—Continued: Page

§ 106(a)(10), 8 U.S.C. 1105a(a)(10) 3
§ 212(c), 8 U.S.C. 1182(c) 2, 8, 15, 16
§ 241(a)(2)(B)(i), 8 U.S.C. 1251(a)(2)(B)(i) 2, 4, 16
§ 242(b), 8 U.S.C. 1252(b) 13
§ 242A, 8 U.S.C. 1252a 13
§ 242B, 8 U.S.C. 1252b 13
18 U.S.C. 1956(a)(1)(A) 2
8 C.F.R.:
Pt. 3:
Subpt. B:
Section 3.1(b)(2) 13
Section 3.1(b)(3) 13
Subpt. C 13
Pt. 242 13
Section 242.16(a) 13
Section 242.17(a) 13
Section 242.21 13

Miscellaneous:

142 Cong. Rec. (daily ed. Sept. 28, 1996):
pp. H11,787-H11,833 8
p. H11,800 17
pp. H11,803-H11,804 9
p. H11,808 ..... 9, 17
Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915 (1988) 10
S. Rep. No. 48, 104th Cong., 1st Sess. (1995) 11

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-985

ANTONIO CESAR CHAMORRO-TORRES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is not reported. The opinions of the Board of Immigration Appeals (Pet. App. 3-7) and the immigration judge (Pet. App. 8-11) are also not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996. The petition for a writ of certiorari was filed on December 16, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Chile, was admitted to the United States as a lawful permanent resident in 1977, based on his marriage to a United States citizen. On November 2, 1990, in the United States District Court for the Southern District of Texas, he was convicted of laundering money, in violation of 18 U.S.C. 1956(a)(1)(A), and was sentenced to 51 months' imprisonment. Pet. App. 3-4.

2. In August 1993, the Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner on the ground that his conviction for money laundering rendered him deportable under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(B)(i), as an alien convicted of a crime relating to a controlled substance. Petitioner admitted the conviction and conceded deportability, but requested a waiver of deportation under Section 212(c) of the INA, 8 U.S.C. 1182(c). The immigration judge granted the requested relief. Pet. App. 8-11.

3. After reviewing the matter *de novo*, the Board of Immigration Appeals (BIA) concluded that petitioner was statutorily ineligible for discretionary relief from deportation. Pet. App. 3-7. The BIA pointed out that, in October 1988, petitioner and his family had sold all of their belongings in this country, and moved back to Chile "to establish a better life for [the] family." *Id.* at 4. Although petitioner ultimately returned to the United States in October 1989, the BIA concluded that, because of his one-year hiatus in Chile, petitioner lacked the seven years' unrelinquished domicile in this country required by Section 212(c). Pet. App. 5-6. Accordingly, the BIA vacated

the immigration judge's decision, denied petitioner's application for relief, and ordered his deportation. *Id.* at 6-7.

On November 13, 1995, petitioner filed a petition for review of that final deportation order.

4. At the time of the BIA's decision, Section 106(a)(1)-(6) of the INA, 8 U.S.C. 1105a(a)(1)-(6), authorized review of final orders of deportation in the courts of appeals, and Section 106(a)(10) of the INA, 8 U.S.C. 1105a(a)(10), authorized the district courts to entertain petitions for writs of habeas corpus filed by aliens held in custody pursuant to orders of deportation.

On April 24, 1996, while the petition for review was pending in the court of appeals, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 401(e) of the AEDPA repealed INA Section 106(a)(10)'s special provision for habeas jurisdiction, 110 Stat. 1268, and Section 440(a) of the AEDPA amended Section 106(a)(10) to exclude from judicial review final orders of deportation entered against certain classes of criminal aliens, 110 Stat. 1276. As amended by the AEDPA, Section 106(a)(10) read in pertinent part as follows:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) * * * shall not be subject to review by any court.

110 Stat. 1276-1277. Section 440(d) of the AEDPA, in turn, amended INA Section 212(c) to eliminate the Attorney General's authority to grant relief from deportation to any alien who "is deportable by reason

of having committed any [such] criminal offense." 110 Stat. 1277. Petitioner, as noted, is deportable under Section 241(a)(2)(B)(i) of the INA, 8 U.S.C. 1251(a)(2)(B)(i), by reason of having committed a crime related to a controlled substance.

5. On September 17, 1996, the court of appeals summarily dismissed the petition for review for lack of jurisdiction. Pet. App. 1.

ARGUMENT

1. Contrary to petitioner's argument (Pet. 4), the court of appeals correctly recognized that Section 440(a) of the AEDPA divested it of jurisdiction over petitioner's petition for review, which was pending at the time of the AEDPA's enactment. That issue is, moreover, of little continuing importance, since presumably there are few such cases remaining that were pending in the courts of appeals when the AEDPA was enacted nine months ago, yet have not been finally disposed of under Section 440(a) of the Act. This Court recently denied certiorari in a case raising the same issue. See *Mendez-Rosas* v. *INS*, cert. denied, No. 96-6076 (Jan. 6, 1997). There is no reason why this case should be treated differently.

a. With the exception of the Seventh Circuit, which deviated from the others in a limited respect not applicable here, every court of appeals that has considered the matter has concluded that Section 440(a) of the AEDPA operated immediately upon its enactment to divest the courts of jurisdiction to review final orders of deportation, resulting in the dismissal of petitions then pending before them. See *Kolster* v. *INS*, 101 F.3d 785, 787-791 (1st Cir. 1996); *Salazar-Haro* v. *INS*, 95 F.3d 309, 310-311 (3d Cir. 1996); *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 29 (2d Cir.

1996); *Duldulao* v. *INS*, 90 F.3d 396, 398-400 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 674-676 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997); see also *Sanchez-Rodriguez* v. *INS*, No. 96-9518 (10th Cir. July 12, 1996) (per curiam order dismissing petition for review for lack of jurisdiction); *Rolle* v. *INS*, No. 96-4560 (11th Cir. July 15, 1996) (same); but see *Reyes-Hernandez* v. *INS*, 89 F.3d 490, 492-493 (7th Cir. 1996) (concluding that Section 440(a) did not divest courts of jurisdiction to entertain petitions for review filed by aliens who waived colorable defenses to deportability and sought discretionary relief before the enactment of the AEDPA), discussed at note 3, *infra*.

b. The court of appeals correctly concluded that Section 440(a)'s preclusion of judicial review operated immediately to divest it of jurisdiction to review the petition pending before it. In *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), this Court explained that, "[w]hen a case implicates a federal statute enacted after the events in suit," absent an express provision respecting its temporal reach, the court must determine whether present application of the new statute "would have retroactive effect." *Id.* at 280. If so, it is presumed that Congress did not intend the new statute to apply to that case. *Ibid.* The Court cautioned, however, that the presumption is not a bright-line rule: "[A]pplication of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273. In particular, the Court noted that "intervening statutes conferring or ousting jurisdiction" are ordinarily given immediate effect, "whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. The Court explained that "[p]resent law normally governs in such situations

because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Ibid.*[1]

Landgraf thus reaffirmed the long-standing tenet that, "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (citing *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Gwin* v. *United States*, 184 U.S. 669, 675 (1902); *Gurnee* v. *Patrick County*, 137 U.S. 141, 144 (1890); *Sherman* v. *Grinnell*, 123 U.S. 679, 680 (1887); *Railroad Co.* v. *Grant*, 98 U.S. 398, 401 (1879); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). See also *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386, 390 (1953) ("When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. * * * If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit."); accord *The Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870); *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 544 (1867).

No provision of the AEDPA preserves the courts of appeals' jurisdiction over petitions for review that were pending at the time of its enactment.[2] Accord-

---

[1] Accord 511 U.S. at 293 (Scalia, J., concurring in the judgments) ("Our jurisdiction cases are explained * * * by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.").

[2] Section 440(f) of the AEDPA provides that the amendments effected by Subsection (e) (relating to modifications made to the definition of "aggravated felony" in Section

ingly, Section 440(a) operated immediately to eliminate the jurisdiction of the courts of appeals. To the extent that the dismissal of pending petitions may upset the expectations of aliens who anticipated a further level of review, that does not justify a departure from long-settled principles. "A statute does not operate 'retrospectively' merely because it * * * upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269. Irrespective of the disappointment felt by those aliens whose cases were pending on review, Section 440(a) is not retroactive in nature: It speaks to the present power of the courts to review final deportation orders, rather than to the rights of aliens. *Id.* at 274.[3]

101(a)(43) of the INA, 8 U.S.C. 1101(a)(43)) "apply to convictions entered on or after the date of [the AEDPA's enactment]." 110 Stat. 1278. Congress, however, made no express provision respecting the temporal application of the other subsections of Section 440, and the effective date provisions that relate to various other Sections of the AEDPA provide no reliable indication of Congress's intent in that regard. See *Duldulao*, 90 F.3d at 398 n.2; *Mendez-Rosas*, 87 F.3d at 675 & n.4.

[3] The Seventh Circuit lost sight of that principle in *Reyes-Hernandez*. Positing that an alien who had conceded deportability before the enactment of the AEDPA might have deliberately done so in order to apply for discretionary relief, 89 F.3d at 493, it held that "to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal consequence to the concession, an event that occurred before the new law came into existence." *Id.* at 492-493. The court failed to appreciate the import of this Court's observation that jurisdictional statutes apply to cases pending at the time of their enactment because such statutes address the power of the courts, which holds true irrespective of any expectations that a particular alien might have had regarding the availability of further review. See *Landgraf*, 511 U.S. at

c. On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (*reproduced at* 142 Cong. Rec. H11,787-H11,833 (daily ed. Sept. 28, 1996)), which effected a sweeping overhaul of the INA. Section 306(b) of IIRIRA repeals Section 106 of the INA, which heretofore has governed the review of deportation and exclusion orders (and which Section 440(a) of the AEDPA had amended), and Section 306(a) of IIRIRA replaces it with a new Section 242, which precludes judicial review of removal orders against aliens, like petitioner, who are removable by reason of having committed drug-trafficking-related offenses. IIRIRA § 306(a)(2) (*reproduced at* 142 Cong. Rec. H11,803-H11,804 (daily ed. Sept. 28, 1996)). Be-

---

274-275. Contrary to the Seventh Circuit's apparent understanding, moreover, Reyes-Hernandez was free both to contest the grounds of deportability *and*, in the alternative, to seek discretionary relief under Section 212(c) should he be found to be deportable. We therefore share the Second Circuit's skepticism "that any alien concedes deportability only because of the expected possibility of section 212(c) relief and the availability of a petition for review of the denial of such relief." *Hincapie-Nieto*, 92 F.3d at 30. "It is far more likely," as that court recognized, "that deportability is conceded because there is no conceivable defense available." *Ibid.*

In any event, the Seventh Circuit expressly observed that its holding did not extend to circumstances in which the petitioner "does not challenge the fact that he is an alien properly found deportable." *Reyes-Hernandez*, 89 F.3d at 493 (citation omitted). In this case, petitioner does not dispute that he is deportable on the basis of his money-laundering conviction, and the record contains a certified copy of that conviction. See also *Arevalo-Lopez* v. *INS*, No. 96-1754, 1997 WL 1898 (7th Cir., Jan. 3, 1997) (no colorable defense where INS proffered certified conviction records).

cause petitioner's deportation order was entered in 1995, IIRIRA's judicial review provisions do not apply to his case. See IIRIRA § 309(a) and (c)(4) (*reproduced at* 142 Cong. Rec. H11,808 (daily ed. Sept. 28, 1996)), as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 (changes effected by Title III-A of IIRIRA generally become effective on April 1, 1997); see *INS* v. *Yang*, 117 S. Ct. 350, 352 n.1 (1996). IIRIRA's imminent supersession of Section 440(a) of the AEDPA, however, diminishes the legal significance of cases, such as this one, that interpreted the latter provision.

2. Petitioner also argues (Pet. 4-5) that the preclusion of judicial review of final orders of deportation entered against aliens convicted of certain serious crimes violates the Due Process Clause of the Fifth Amendment and the principle of separation of powers. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

a. Contrary to petitioner's argument, the separation of powers doctrine does not require Congress to provide an Article III forum to review all claims that may arise from the BIA's denial of an application for discretionary relief from deportation. Although the judicial power of the United States must be exercised by Article III courts, U.S. Const. Art. III, § 1; see generally *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57-60 (1982) (opinion of Brennan, J.), Congress unquestionably has the power to assign the adjudication of certain matters to administrative agencies. In particular, "there are matters, *involving public rights*, which may be presented in such form that the judicial power is

capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Northern Pipeline*, 458 U.S. at 67 (opinion of Brennan, J.) (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)) (emphasis added in *Northern Pipeline*).

"[T]he public-rights doctrine * * * draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government." *Northern Pipeline*, 458 U.S. at 67 (opinion of Brennan, J.); accord *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929). Congress's plenary authority over matters respecting immigration, and its vesting of adjudicatory authority over immigration matters in administrative agencies, are paradigmatic in that regard. *Northern Pipeline*, 458 U.S. at 69 n.22 (opinion of Brennan, J.) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932)). This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); see also *Reno* v. *Flores*, 507 U.S. 292, 305 (1993); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 967 (1988) ("[B]ecause of the longstanding assumption that the executive and legislative branches possess plenary power over immigration issues, the surrounding body of law falls within the public rights category.") (footnote omitted). Because the admission and expul-

sion of aliens involves a public right—indeed a fundamental sovereign right—Congress possesses broad authority to grant or withhold the courts' jurisdiction respecting such matters. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 280 (1922).

Petitioner's reliance on the Due Process Clause of the Fifth Amendment is equally unavailing. Because "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government," *Galvan* v. *Press*, 347 U.S. 522, 531 (1954), legislation respecting immigration must be sustained so long as it is based upon a "facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972)). In enacting the AEDPA, Congress was concerned about the delays that attended the process by which deportable criminal aliens are removed from the country. See S. Rep. No. 48, 104th Cong., 1st Sess. 3, 26 (1995) (noting, under a Section entitled "Current Procedures Allow Delay and Abuses of Deportation Process by Criminal Aliens," that the deportation process for criminal aliens "is byzantine," and, under a Section entitled "Overview and Summary of the Investigation," that "[t]here is little reason for the multiple levels of appeal and delay in the deportation process which current law permits"). Section 440(a) was an integral part of Congress's plan to streamline that process and, for the common welfare, expeditiously to deport serious criminal aliens. Those unquestionably are rational legislative ends. See *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982) (acknowledging the government's "weighty" interest in the "efficient administration of the immigration laws"); accord *INS* v. *Rios-Pineda*, 471 U.S. 444, 449-452 (1985).

It is critical to recognize, on the other side of the ledger, that a resident alien has no substantive entitlement to reside in this country; his ability to remain is at the sufferance of Congress. It is a matter not of "right" but of "permission and tolerance." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586-587 (1952). Given the political character of the decision, this Court has long recognized that the determination whether an alien may remain in this country in the future may be made through "appropriate *executive* proceedings." *Ng Fung Ho*, 259 U.S. at 280 (emphasis added); accord *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.'"); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893) ("[A]lthough Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts * * *, yet Congress might intrust the final determination of those facts to an executive officer, and * * *, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency.").[4]

In enforcing the government's immigration policies, the Executive Branch must, of course, "respect

---

[4] Citizens, of course, have a substantive right to remain in the United States, and for that reason a judicial forum must be available for bona fide disputes respecting citizenship. See *Ng Fung Ho*, 259 U.S. at 284 ("Jurisdiction in the executive to order deportation exists only if the person arrested is an alien.").

the procedural safeguards of due process." *Galvan*, 347 U.S. at 531. Thus, a resident alien unquestionably has the right to a "hearing on the charges underlying any attempt to exclude him." *Plasencia*, 459 U.S. at 33.[5] This Court has never held, however, that procedural due process guarantees judicial review of an administrative hearing. To the contrary, the Court has made clear that an individual has no such entitlement. See *Ortwein* v. *Schwab*, 410 U.S. 656, 660 (1973) (per curiam) (rejecting due process challenge to filing fee for judicial review of administrative decision; "due process does not require a State to provide an appellate system"); accord *Edward* v. *Paul*, 814 F.2d 52, 55 n.2 (1st Cir. 1987).

b. No court of appeals has accepted petitioner's argument that due process and the separation of powers doctrine require that every aspect of a final order of deportation be subject to direct judicial

---

[5] The INA and implementing regulations entitle an alien to notice of the charges and a meaningful opportunity to be heard. See 8 U.S.C 1252(b), 1252a, 1252b; 8 C.F.R. Pt. 3, Subpt. C, and Pt. 242. Specifically, an alien is entitled to a deportation hearing, during which an immigration judge explains the charges, advises the alien as to his eligibility for certain forms of relief from deportation, and informs the alien of his right to be represented by counsel at no expense to the government. See 8 U.S.C. 1252(b); 8 C.F.R. 242.16(a), 242.17(a). If the alien denies deportability at that hearing, the burden is on the Immigration and Naturalization Service (INS) to prove by "clear, unequivocal, and convincing" evidence that the alien is in fact deportable. *Woodby* v. *INS*, 385 U.S. 276, 286 (1966). If the INS prevails in the deportation hearing, the alien may appeal that decision to the BIA, see 8 C.F.R. 3.1(b)(2) and (3), 242.21, which exercises its "own independent judgment in deciding the ultimate disposition" of cases involving discretionary determinations. *In re Burbano*, 20 I. & N. Dec. 872, 873 (BIA 1994).

review. The only court of appeals that has addressed that argument rejected it. See *Duldulao*, 90 F.3d at 399-400. The argument that the Constitution requires the availability of judicial review is especially weak where, as here, the alien has conceded that he is deportable (on the basis of a judgment of conviction in an Article III court), and the only remaining dispute concerns whether he is eligible to be considered for discretionary relief from deportation.

Several courts have indicated that Article I, Section 9, of the Constitution may in certain limited instances require the availability of habeas review. See *Kolster*, 101 F.3d at 790 (Section 440(a)'s elimination of direct judicial review does not offend due process or separation of powers because "any habeas review that is required by the Constitution remains available."); *Salazar-Haro*, 95 F.3d at 311 (due process concerns are satisfied by the availability of constitutionally mandated habeas review); *Hincapie-Nieto*, 92 F.3d at 30-31 (noting that a petitioner may seek relief in habeas, but "express[ing] no opinion on the nature of the remedy or the scope of [habeas] review that remains available in any court"); *Duldulao*, 90 F.3d at 400 n.4 ("The availability and scope of collateral habeas review where the 'paramount law of the Constitution' may require judicial intervention was not an issue before us, and we need not decide whether section 440(a) purports to preclude it.") (citation omitted).

Because the courts of appeals have not yet ruled on what claims (if any) relating to final orders of deportation may be subject to review via a petition for a writ of habeas corpus, that issue does not warrant this Court's review at this time. Even if the availability and breadth of habeas corpus were ripe for review,

moreover, this case would be an inappropriate vehicle for decision, because petitioner has not sought a writ of habeas corpus, and the decision below did not concern such relief.[6] Cf. *Kolster*, 101 F.3d at 791 ("As the nature and scope of habeas review available to aliens like Kolster is not properly before us at this time, we do not reach those questions."); accord *Duldulao*, 90 F.3d at 400 n.4.

3. In any event, further review in this case is unwarranted because the Attorney General no longer has the authority to provide petitioner the relief from deportation that he requested and that was the subject of his petition for review in the court of appeals. Before the enactment of the AEDPA, the final sentence of Section 212(c) stated that discretion-

---

[6] We have little doubt that, had petitioner filed a petition for a writ of habeas corpus, it would have been denied, and rightly so. The constitutional writ has historically been available in the deportation context only to redress significant violations of constitutional rights or ultra vires actions exceeding the Attorney General's delegated power or jurisdiction. It has never been thought to extend to claims of lesser errors, such as a lack of substantial evidence to support a decision, an abuse of discretion, or (as here) a claim that the Attorney General or her delegate has misinterpreted a non-jurisdictional statutory provision. See, *e.g.*, *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*. But a want of due process is not established by showing merely that the decision is erroneous.") (citations omitted); *United States ex rel. Tisi* v. *Tod*, 264 U.S. 131, 132-134 (1924) ("Tisi's claim to be discharged on *habeas corpus* rests wholly upon the contention that he has been denied due process of law. * * * [M]ere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law.").

ary waivers were not available to any "alien who ha[d] been convicted of one or more aggravated felonies and ha[d] served for such felony or felonies a term of imprisonment of at least 5 years." 8 U.S.C. 1182(c). Section 440(d) of the AEDPA amended that sentence to provide that Section 212(c) "shall not apply," *inter alia*, to any "alien who is deportable by reason of having committed any criminal offense covered in [INA] section 241(a)(2)(A)(iii), (B), (C), or (D)." 110 Stat. 1277. As noted above, petitioner is deportable by reason of having committed a criminal offense covered in Section 241(a)(2)(B)(i).

The AEDPA does not specify in terms whether Section 440(d) bars the Attorney General from acting on a petition for relief filed by an alien on or before the date of its enactment. But because the focus of a determination respecting discretionary relief is forward-looking[7]—and because the actual granting of relief is the action targeted by Congress[8]—it follows

---

[7] See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the [alien's] right to remain in this country in the future."); see also *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996) ("Like statutes altering the standards for injunctive relief," changes in the scope of the Attorney General's discretionary authority "ha[ve] only a prospective impact.").

[8] Just as new "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 511 U.S. at 274, Section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to obtain such relief. The principles underlying the immediate application of jurisdictional rules to pending cases thus apply equally in this context. See *Scheidemann*, 83 F.3d at 1523 ("Like statutes constricting the jurisdiction of a judicial body," changes to the class of aliens

that Section 440(d) is properly understood to have eliminated the Attorney General's power to provide relief in cases pending at the time of its enactment.[9]

Since the Attorney General lacks authority under current law to grant petitioner's application for a waiver of deportation under Section 212(c),[10] this case is moot.

---

eligible for Section 212(c) relief "speak only to the power of a public agency.").

[9] The BIA held in *In re Soriano*, Interim Dec. No. 3289 (June 27, 1996), that Section 440(d) of the AEDPA did not eliminate its authority to provide relief in pending cases. At the request of the INS, however, the decision in *Soriano* was referred to the Attorney General for her review, see 8 C.F.R. 3.1(h), and by order dated September 12, 1996, the Attorney General vacated the BIA's opinion pending her further determination.

[10] We note that Section 304 of IIRIRA repeals Section 212(c) in its entirety and replaces it with a new Section 240A, which authorizes a form of discretionary relief termed "cancellation of removal." See IIRIRA § 304(a)(3) and (b) (*reproduced at* 142 Cong. Rec. H11,800 (daily ed. Sept. 28, 1996)). With certain limited exceptions not applicable here, IIRIRA's provisions respecting cancellation of removal apply, however, only to administrative proceedings initiated on or after April 1, 1997. See IIRIRA § 309(a) and (c) (*reproduced at* 142 Cong. Rec. H11,808 (daily ed. Sept. 28, 1996)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DONALD E. KEENER
HUGH G. MULLANE
Attorneys

JANUARY 1997